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PP

v.

HASHIM YUSOFF & ANOR

B

HIGH COURT MALAYA, JOHOR BHARU
KP GENGADHARAN NAIR J
[CRIMINAL TRIAL NO: MT(3) 45-24-2000]
16 DECEMBER 2005

C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 30,520 grams of cannabis - No evidence that weighing scale was properly and accurately calibrated - Whether prosecution failed to prove that cannabis weighed 30,520 grams - Whether prosecution only able to prove prima facie case of possession - Whether charge should be amended to one under s. 6*

D

Both the accused were charged with trafficking in 30,520 grams of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') read together with s. 34 of the Penal Code ('Code') and punishable under s. 39B(2) DDA. The issue was whether the prosecution had made out a *prima facie* case against both the accused in respect of the said charge.

E

Held (amending the charge to one under s. 6 DDA read together with s. 34 of the Penal Code):

[1] Both the accused had custody and control of the packages containing cannabis recovered by the customs officers. There was no evidence that they had actual knowledge of the contents of the packages. However, by virtue of s. 37(d) DDA they were deemed to have had possession of the cannabis and further until the contrary was proved they were deemed to have had known the nature of the drug. (para 14)

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[2] The charge against both the accused was the trafficking of 30,520 grams of cannabis. To arrive at that weight, the weighing scale must be a properly calibrated one. There was no evidence that the scale was properly and accurately calibrated. In the circumstances the prosecution had failed to prove that the cannabis did in fact weigh 30,520 grams. A charge either under s. 39A(1), (2) or s. 39B DDA depended on the actual weight of the dangerous drug. As it was not in the circumstances of the case possible to determine the actual weight of the drug in issue, the prosecution was only able to prove a *prima facie* case of possession of some cannabis. It followed that the charge should be amended to one under s. 6 DDA read together with s. 34 of the Code. (paras 14 & 15)

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Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 37A, (d), 39A(1), (2), B(1)(a), (2)
Penal Code, s. 34

For the prosecution - Anas Ahmad Zakie; DPP
For the 1st accused - Norman Fernandez; M/s Ashekin, Norman Fernandez & Assoc
For the 2nd accused - Zahar Ngah; M/s Haza & Zahar

Reported by Usha Thiagarajah

JUDGMENT

KP Gengadharan Nair J:

The Charge

[1] Both accused were charged with trafficking in 30,520 grams of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act, 1952 (hereinafter referred to as "the Act") read together with s. 34 of the Penal Code and punishable under s. 39B(2) of the Act. Both accused claimed trial to the charge. At the close of the prosecution's case I held that the prosecution had not made out a *prima facie* case in respect of the charge under s. 39B(1)(a) of the Act but had made out a *prima facie* case under s. 6 of the Act read together with s. 34 of the Penal Code against both accused. Accordingly, the charge (P20) was framed as follows against both accused.

> Bahawa kamu bersama-sama pada 5 Jun 1999 jam lebih kurang 4.15 pagi di Batu 11, jalan Skudai, di dalam Daerah Johor Bahru, dalam Negeri Johor Darul Takzim telah didapati memiliki dadah berbahaya iaitu cannabis dan oleh yang demikian itu kamu bersama-sama telah melakukan suatu kesalahan di bawah Seksyen 7 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen yang sama Akta tersebut dan dibaca bersama di bawah Seksyen 34 Kanun Keseksaan.

[2] Upon the charge being read and explained to both the accused they pleaded guilty. I sentenced each of the accused to the maximum term of imprisonment of five years w.e.f. 5 June 1999 (date of arrest) and to a fine of RM10,000 in default to twelve months' imprisonment. This appeal is by the Public Prosecutor against the order made by me.

Facts

[3] On the night of 4 June 1999 Abdul Wahabi bin Abdullah (PW5) then a Penguasa Kastam, Unit Operasi, Cawangan Pencegahan, Johor Bahru led a team of his officers in an ambush after receiving information that some drug related activities were due to take place in an oil palm

estate in Jalan Skudai, Johor Bahru. The customs officers were divided into several teams. At about 4 am PW5 saw a motorcycle with the 1st accused as the rider and the 2nd accused as the pillion in the location of the ambush. The 2nd accused was carrying a black garbage bag and there was another one on the motorcycle in front of the 1st accused. The motorcycle was pursued by the customs officers on motorcycle and a car. When the car with PW5 in it came parallel to the motorcycle of the accused persons, PW5 shouted to the accused to stop but was ignored. PW5 heard some shots being fired behind him. It was PW5's evidence that when the accused persons were on the motorcycle, one item wrapped in black was placed in front of the 1st accused and the other item also wrapped in black was held by the 2nd accused with his arms around it. As the 1st accused tried to speed away the motorcycle was blocked by the customs car and this caused both the accused to fall. PW5 and one of his officers, Kamaruddin, dashed out of their car and caught hold of the 1st accused whilst the 2nd accused tried to run away but was hindered by another officer, Razali Hassan, and was caught by yet another officer, Yahaya. The two packages wrapped in black which were carried on the motorcycle and by the 2nd accused had fallen near the motorcycle. An examination of both the wrapped packages by PW5 showed that they contained 15 packets each of compressed dried leaves wrapped in clear plastic. Thereupon, both the accused and the two packages (P7A & P8A) were seized and taken back to the office of the customs.

[4] In the course of the examination-in-chief of PW5 the prosecution attempted to introduce alleged oral statements of both the accused under s. 37A of the Act. The relevant part of the testimony in this regard is as follows:

> Kemudian saya terus mengambil salah satu bungkusan hitam. Sebelum itu saya arahkan Yusof bin Rahman mengambil gambar bungkusan hitam dan motosikal. Kemudian setelah Yusof selesai mengambil gambar saya mengambil salah satu bungkusan hitam dan membukanya di hadapan OKT1 dan OKT2.
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> Setelah bungkusan tersebut dibuka didapati di dalamnya bungkusan guni berwarna putih dan setelah bungkusan guni dibuka saya dapati di dalamnya terdapat ketulan daun kering mampat dan dibungkus dengan plastik cerah. Kemudian saya terus membaca amaran kepada OKT1 dan OKT2.
>
> Setelah amaran dibaca saya bertanya kepada OKT1 "apakah barang tersebut". OKT1 menjawab "ganja".
>
> Saya seterusnya bertanya kepada OKT2 apakah barang tersebut. OKT2 menjawab "ganja".

[5] Upon objection by the learned counsel for the accused persons a trial-within-a-trial was held to determine the admissibility of the statements. The prosecution called three witnesses and after hearing both accused the prosecution submitted that it had proved beyond reasonable doubt that the statements were made voluntarily. The accused in their testimony stated that neither was the caution administered to them nor did they utter the word "ganja" in answer to the question "Apa barang ini?" by PW5. They further stated that they were handcuffed immediately upon being stopped and caught.

[6] The defence submitted that it was unlikely that the caution was administered and that even if it was, the statements were not given voluntarily as the accused were handcuffed right from the moment they were caught after the chase. The prosecution witnesses PW1 and PW2 denied that the accused were handcuffed but agreed that they were being held by the hands and were thus being restrained by being physically held. Both the accused were positioned side by side and being guarded by two officers, PW2 & PW3. PW2, Kamaruddin bin Ujang testified, *inter alia*, in examination-in-chief as follows:

> Encik Wahabi mengarahkan saya membuka topi keledar OKT(1) dan (2). Saya mengarah OKT(1). Saya diarahkan oleh Wahabi mengawal OKT(1). Saya pegang tangan dia. Semasa itu saya belum gari OKT(1).
>
> Saya ada mendengar Encik Wahabi memberi amaran kepada OKT(1).
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> Selepas Wahabi memberi amaran saya mendengar Wahabi bertanya OKT(1) "apa barang". OKT(1) menjawab "ganja". Pada masa itu OKT(2) ada berhampiran di sebelah saya dan OKT(1).
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> Saya tidak ingat sama ada Encik Wahabi ada memberi amaran kepada OKT(2).
>
> Pada masa itu OKT(2) dikawal oleh Pegawai Kastam, Yahaya.

[7] Although he could not remember whether the caution was administered to the 2nd accused, nevertheless in cross examination he disagreed that the caution was not given to both the accused.

[8] The defence contented that the alleged oral statements, even if given, were not voluntarily given based on the sequence of events immediately prior to that ie, the chase, the gunshots, the capture and the restraining.

[9] It was argued that it was highly unlikely that after a high speed car chase and capture, the customs officers merely held the hands of both the accused and administered the caution and only after the answer to the question "Apa barang?" and the alleged answers by both accused, they were handcuffed. Both the accused testified that they were

handcuffed right from the time they were caught, no caution was administered and they did not utter the word "ganja". The alleged oral question and oral statements were not recorded in writing anywhere subsequently by PW1. Even if he did not have any paper with him at that time he could have done so immediately after he returned to his office. The onus is on the prosecution to prove beyond reasonable doubt that the statements were made voluntarily. After considering the evidence in the trial-within-a-trial I found that the prosecution had not discharged the required burden of proof and consequently ruled that the statements are inadmissible.

[10] The Chemist (PW4) testified that he carried out four tests in respect of the exhibits found in the two bags seized from the accused persons and from the motorcycle. The tests performed were:

1. Visual examination.
2. Examination under the microsope;
3. Duquenois Levine Test;
4. Thin Layer Chromotography Test.

[11] PW4 also testified that he took 32 random samples of the contents of the exhibits suspected to contain drugs for each of the 3rd & 4th tests referred to above. Before taking the samples he weighed the 15 blocks from each of the two packages. However, there is no evidence of the weight of the samples taken by him for the 3rd & 4th tests. Upon the analysis of the samples he confirmed that the samples were cannabis and hence the drugs in the 30 plastic packets with a total weight of 30,520 grams.

[12] The Chemist was cross-examined about the calibration of the weighing scale used by him to determine the weight of the cannabis. His evidence was as follows in the regard:

> Alat timbang tersebut ada dikalibrasikan oleh Ahli Kimia yang ditugaskan oleh Jabatan Kimia.
>
> Saya ada menyemak atau memeriksa alat timbang sebelum digunakan untuk menimbang barang kes dengan menimbang pemberat piawai (standard weight) dan didapati alat timbang tersebut bacaannya betul mengikut berat piawai.
>
> Saya setuju alat penimbang itu tidak mempunyai Sijil Kalibrasi.

[13] No proof of any calibration of the weighing scale by a designated officer of the Chemistry Department was produced by the prosecution although the Chemist was questioned in cross-examination in this regard.

[14] At the end of the prosecution's case I was satisfied that both accused had custody and control of the packages containing cannabis recovered by the customs officers. There is no evidence that they had actual knowledge of the contents of the packages. However, by virtue of s. 37(d) of the Dangerous Drugs Act 1952 they are deemed to have been in possession of the cannabis and further until the contrary is proved they are deemed to have known the nature of the drug. However, the charge against both accused was the trafficking of 30,520 grams of cannabis. To arrive at the weight of the cannabis the weighing scale used to do so must be a properly calibrated one.

[15] There was no evidence before me that the scale was properly and accurately calibrated. Thus, in the circumstances the prosecution had failed to prove that the cannabis which was the subject matter of the charge did in fact weigh 30,520 grams. As a charge either under s. 39A(1) or (2) or 39B of the Dangerous Drugs Act 1952 depends on the actual weight of the dangerous drug, it was not in the circumstances of this case possible to determine the actual weight of the drug in issue, in view of the doubt whether the weighing scale was accurately calibrated. Hence, as the prosecution was only able to prove a *prima facie* case of possession of some cannabis by the accused persons, I amended the charge to one under s. 6 of the Dangerous Drugs Act 1952 read together with s. 34 of the Penal Code.